Supreme Court, U.S.
FILED

09-427 SEP 28 2009

OFFICE OF THE CLERK
William K. Suter, Clerk

No. 09-___

IN THE

Supreme Court of the United States

TONE N. GRANT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR A WRIT OF CERTIORARI

ROGER E. ZUCKERMAN *
AITAN D. GOELMAN
ZUCKERMAN SPAEDER LLP
1800 M Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 778-1800

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether arguing that the defendant "had absolutely no idea that his lawyers were going to be producing these handwritten notes" to the SEC and urging the inference that the production of the notes was accidental deceived the jury in violation of the due process principles long established in cases such as *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), and *Skipper v. South Carolina*, 476 U.S. 1 (1986), when the defense had proffered testimony that the defendant knew and approved of his lawyers' production of the notes but the district court sustained the prosecution's objection to the testimony?

2. Whether in federal criminal cases evidence that the defendant's conduct manifested an innocent state of mind (so-called consciousness of innocence evidence) is held to a more demanding standard of admissibility than evidence of conduct manifesting a guilty state of mind (so-called consciousness of guilt evidence)?

LIST OF PARTIES TO THE PROCEEDINGS

Tone Grant was the sole defendant at trial in the district court and the sole appellant in the court of appeals. Phillip R. Bennett and Robert Trosten were also named as defendants in the indictment; however they both entered guilty pleas prior to trial.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE WRIT 8

CONCLUSION 17

APPENDIX A -- Court of Appeals' Opinion 1a

APPENDIX B -- Excerpts from March 18, 2008 Trial Transcript -- District Court's Ruling on Evidence 9a

APPENDIX C -- Excerpt from April 15, 2008 Trial Transcript -- District Court's Ruling on Prosecution Argument 21a

APPENDIX D -- Excerpt from April 16, 2008 Trial Transcript -- Prosecution Rebuttal Argument and Objection 25a

TABLE OF AUTHORITIES

CASES

Brown v. Borg, 951 F.2d 101 (9th Cir. 1991) 11

County of Los Angeles v. Kling, 474 U.S. 936 (1985) 11

Davis v. Zant, 36 F.3d 1538 (11th Cir. 1994) 10

Giglio v. United States, 405 U.S. 150 (1972) 9

Holmes v. South Carolina, 547 U.S. 319 (2006) 16

Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992) 10

Miller v. Pate, 386 U.S. 1 (1967) 8

Mooney v. Holohan, 294 U.S. 103 (1932) 8

Skipper v. South Carolina, 476 U.S. 1 (1986) 8, 9, 10

Smith v. United States, 502 U.S. 1017 (1991) 11

United States v. Bennett, 485 F.Supp. 2d 508 (S.D.N.Y. 2007) 1

United States v. Biaggi, 909 F.2d 662 (2d Cir. 1990) ..... *passim*

United States v. Blueford, 312 F.3d 962 (9th Cir. 2002) 11

United States v. Grant, 2008 WL 4579992, *7 (S.D.N.Y. Oct. 14, 2008) 15

United States v. Hamilton, 579 F. Supp.2d 637 (D.N.J. 2008) 17

United States v. Maloof, 205 F.3d 819 (5th Cir. 2000 17

United States v. Reyes, 2009 WL 2501920, *7 (9th Cir. Aug. 18, 2009) 9

United States v. Scheffer, 523 U.S. 303 (1998) 17

United States v. Teffera, 985 F.2d 1082 (D.C. Cir. 1993) 11

United States v. Udechukwu, 11 F.3d 1101 (1st Cir. 1993) 10

United States v. Wilson, 135 F.3d 291 (4th Cir. 1998) 9

RULES

Fed. R. Evid. 403 ..... 5, 14

STATUTES

28 U.S.C. § 1254 1

OTHER AUTHORITIES

2 Wigmore on Evidence (J. Chadbourn rev. ed. 1979) 17

OPINIONS BELOW

The district court's opinion denying severance is published at *United States v. Bennett*, 485 F. Supp. 2d 508 (S.D.N.Y. 2007). The district court's oral rulings concerning (a) the admissibility of evidence that Petitioner voluntarily produced notes to the SEC; (b) permitting the prosecution to argue that the notes had been produced by accident; and (c) overruling the defense objection to the prosecution rebuttal argument are not reported. The excerpts from the trial transcript are reproduced at Pet. App. 9a-20a; 21a-24a; 25a-31a, respectively. The court of appeals' summary order affirming the judgment is not reported. It is reproduced at Pet. App. 1a-8a.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 2009. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution provides, in relevant part:

"No person shall be * * * deprived of life, liberty, or property, without due process of law."

STATEMENT

Tone Grant was the president of Refco, a commodity trading firm, until he was ousted from that position in September 1998. He remained a minority owner and the head of a Refco subsidiary until early 1999, when he was fired and banned from

Refco's offices. He retained an ownership interest in Refco, but had no involvement in the company's management thereafter.[1]

Phillip R. Bennett, Refco's chief financial officer during Mr. Grant's tenure as president and then his successor as president (with the additional title of chief executive officer), executed a scheme to inflate Refco's profits by, among other things, shifting losses sustained by Refco and its consolidated subsidiaries to its unconsolidated parent, RGHI, and falsely reporting these related party transactions. He concealed the related party debt by means of "round trip" loan transactions immediately before and after each financial reporting period. By means of this false accounting, Bennett was able to sell a majority interest in Refco to a private equity firm in a leveraged buyout (LBO) that closed in August 2004. Subsequently, Refco issued an initial public offering (IPO) of stock. Shortly after the IPO, in October 2005, a new accounting team uncovered Bennett's continuing fraud. Bennett repaid the related party debt, but Refco's customers, creditors, stockholders and counterparties lost confidence in the firm, which filed for bankruptcy on October 17, 2005.

Bennett was arrested on fraud charges soon after Refco's collapse. Mr. Grant cooperated with the ensuing SEC investigation, and produced documents

---

[1] In August 1999, the majority owner, Tom Dittmer, exchanged his share of Refco Group Holdings, Inc. (RGHI), the holding company, for a 25% share of the gains if Refco were sold, leaving Mr. Grant half-owner with Phillip Bennett of the holding company. Bennett sold an increasing portion of Refco to BAWAG, an Austrian bank. BAWAG owned 47.2% of Refco at the time of the LBO in 2004.

to the SEC through his counsel. Mr. Grant's document production included his handwritten notes of a meeting with Bennett in May 2004 during which they discussed terms for Mr. Grant's sale of his remaining interest in Refco to Bennett. The SEC, as explained in the subpoena and consistent with its standard practice, shared Mr. Grant's documents with prosecutors. The prosecutors viewed Mr. Grant's notes as incriminating, concluding that they showed an awareness of an undisclosed related party debt prior to the LBO. In November 2006, prosecutors advised Mr. Grant's lawyers that they intended to seek an indictment largely based on the notes.

On January 16, 2007 a grand jury returned a superseding indictment naming Mr. Grant along with Bennett and former Refco CFO Robert Trosten. The indictment charged Mr. Grant with conspiracy, securities fraud, bank fraud, wire fraud, and money laundering.[2] Bennett and Trosten pleaded guilty before trial. Mr. Grant's defense was that he lacked knowledge of Bennett's fraud and, like many others,

---

[2] The substantive counts (securities fraud, wire fraud, bank fraud, and money laundering) alleged Mr. Grant's knowing participation in a scheme to defraud participants in the 2004 LBO. The conspiracy count alleged a conspiracy beginning in October 1997 and concluding in October 2005. Although the conspiracy allegations included theories other than knowing participation in the LBO fraud – deception of a reporter and others about whether Refco had sustained losses when a hedge fund customer could not meet its obligations in 1997 and misrepresentations about whether Refco engaged in "proprietary trading" – neither of those theories was sufficiently supported by credible evidence to make the district court's errors concerning Mr. Grant's notes harmless with regard to the conspiracy count.

had been hoodwinked by Bennett. Mr. Grant's trial began on March 24, 2008, and concluded with a guilty verdict on April 17. On August 7, 2008, the district court sentenced Mr. Grant to an aggregate term of ten years imprisonment.

Mr. Grant's notes of his meeting with Bennett prior to the LBO became the central evidence that Mr. Grant knew of the outstanding related party debt (not reflected in Refco's financial statements) at the time of the LBO, more than five years after he was ousted from Refco's management. The prosecution tried to prove that the notes showed knowledge of Bennett's fraud by offering the testimony of a lawyer for Refco's former majority shareholder, Tom Dittmer, about his own separate conversation with Bennett concerning the terms on which Bennett would pay off Dittmer's retained interest in the company. The prosecutors drew parallels between what Bennett had said to Dittmer's lawyer and information in Mr. Grant's handwritten notes, despite substantial differences between the notes and Dittmer's lawyer's account. In his rebuttal summation, the prosecutor began his discussion of the notes (GX 8047) by asking for the jurors' "attention for the next three or four minutes" even if they "don't listen to anything else I say today, and if you didn't listen to anything that [co-counsel] said yesterday." (Tr. 2965). He concluded the discussion of the notes as he began: "If you don't listen to anything else I say, Ladies and Gentlemen, they're not even disputing this. It's easy." (Tr. 2968).

To refute the prosecutor's explication of the notes as evidence of guilty knowledge, Mr. Grant

sought to call a lawyer who had represented him in civil litigation, including with regard to the production of documents to the SEC. Mr. Grant proffered that his former lawyer, Michael Hannafan, would testify that Mr. Grant specifically authorized production of the notes to the SEC. The district court excluded the Hannafan testimony, principally on the ground that a defendant offering "consciousness of innocence" evidence (such as the voluntary production of a document without demanding immunity) had to meet a more demanding standard than a prosecutor offering "consciousness of guilt" evidence (such as flight or concealment of evidence). Pet. App. 10a-11a. As to consciousness of guilt evidence, it was up to the jury to decide whether to accept the inference of guilty knowledge or alternative explanations. As to consciousness of innocence evidence, the prosecution argued and the district court agreed that the existence of alternative explanations barred admission. The district court, rather than the jury, would decide how to interpret the evidence. The district court also factored this higher standard into the balance of probative value and potential prejudice. *See* Fed. R. Evid. 403. Pet. App. 15a. Mr. Grant's jury was never made aware that he had offered testimony to prove intentional production of the notes.

Although precluding admission of the Hannafan testimony, the district court ruled before trial that Mr. Grant's lawyers could argue an inference that he had voluntarily produced the notes. (3/18 Tr. 49). In an unrecorded telephone conference prior to closing arguments, the district court also granted the prosecution's request to be permitted to

argue "that the submission of the notes of Mr. Grant was accidental." (Pet. App. 22a) (putting prior ruling on the record). Mr. Grant's counsel reiterated for the record the objection that the prosecution, having chosen to object to Hannafan's testimony, "should not be able to argue potential explanations that would have been disproved by his testimony." (*Id.* at 23a-24a). Over defense objection, the government exploited the exclusion of the Hannafan testimony:

> Now they [defense counsel] want you to infer from this fact a whole bunch of things, but *there is no evidence to support these inferences.*
>
> Now I'm going to once again step into their world and do some guesswork with you, and show you that when you enter this game of guessing, you can come up with all sorts of good guesses.
>
> How about this one? Tone Grant had absolutely no idea that his lawyers were going to be producing these handwritten notes when they produced those giant stack of documents.
>
> [Defense Counsel]: Objection.
>
> [Government Counsel]: Giant stack of documents that you can look at in that jury room if you want. They are all the exhibits that are in that stipulation. They are numbered in the eight thousand series. *You look at that giant stack of documents. And you can*

> *speculate and guess that Tone Grant may have had no idea that those notes were mixed in with them. We don't even know when those documents got to his lawyers.*

Pet. App. 27a-28a (emphasis added). The prosecutor continued to harp on the absence of a "shred of evidence" that Mr. Grant had seen the SEC subpoena and defense counsel's "guesswork" and "speculation." Pet. App. 28a-30a.

The only question posed by a member of the jury was "if there is any other evidence entered about the substance of the conversation for the meeting, at the Marriott with Tone [Grant] and Phillip [Bennett] other than Tone Grant's handwritten notes." (Tr. 3081). The district court provided excerpts from the testimony of two of Bennett's former confederates who were cooperating with the prosecution concerning Bennett's plans for the meeting. (Tr. 3092-93). The jury heard nothing, of course, about Grant's intentional production of the notes. Shortly thereafter, the jury returned a guilty verdict.

The court of appeals affirmed the judgment in a summary order. The order did not mention the prosecutor's rebuttal argument. The court "disagree[d]" with Mr. Grant's argument that the district court had "erroneously applied 'a special standard for the admissibility of 'consciousness of innocence' evidence unsupported in this Court's decisions.'" Pet. App. 5a. Instead, the court of appeals solely attributed the exclusion of the Hannafan testimony to the district court's balancing

of probative value against countervailing factors. *Id.* at 5a-6a.

REASONS FOR GRANTING THE WRIT

A. The Court should grant review of the first question presented because the prosecutor's rebuttal argument crossed the line drawn by this Court and other Circuits between fair advocacy and deception. Although these issues typically arise in the form of prosecutorial misconduct, it makes no difference in the due process analysis that here the error was the district court's rather than the prosecutor's. The district court allowed a due process violation to occur when it permitted the prosecutor to argue (over objection) that the defense had presented "no evidence to support these inferences" of intentional production when the defense had tried to do just that; and when it permitted the prosecutor to urge the jury to infer the opposite – accidental production – from the mound of documents Mr. Grant had produced. *See* Grant Opening Br. 77 ("The combination of the ruling excluding Mr. Grant's proffered evidence and allowing the prosecutor to argue the contrary likewise violated Mr. Grant's due process rights," citing *Skipper v. South Carolina*, 476 U.S. 1 (1986)).

As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), the Court held that "deliberate deception" of the jury violated the due process clause. In *Miller v. Pate*, 386 U.S. 1, 7 (1967), the Court held that a prosecutor's misrepresentation of physical evidence as stained with blood rather than paint violated the due process clause. *Mooney* involved the

knowing presentation of perjured testimony, and *Miller* relied on the prosecutor's "deliberate misrepresent[ation]," but the Court has since made clear that constitutional protection does not turn on the individual prosecutor's intent to deceive. *Giglio v. United States*, 405 U.S. 150, 153-54 (1972) (overturning conviction because prosecutor other than the one who tried the case promised a witness he would not be prosecuted, contrary to the witness' testimony at trial). *See United States v. Reyes*, 2009 WL 2501920, *7 (9th Cir. Aug. 18, 2009) (prosecution charged with knowledge of the SEC).

The rule against deceiving the jury applies to an argument that deprives the defense of an opportunity for rebuttal so that the jury is led to regard as uncontested facts that are actually in dispute. Thus, in *Skipper v. South Carolina*, 476 U.S. 1, 5 n.1 (1986), the Court reversed a death sentence because the prosecutor was allowed to argue that the defendant would be dangerous even if imprisoned, but the defendant was prevented from rebutting that claim because the trial court excluded the evidence he proffered. *See also id.* at 9-11 (Powell, J., concurring in the judgment joined by Burger, Ch. J., and Rehnquist, J.) (relying exclusively on due process rationale). While the jury in *Skipper* would have been free to disregard the defense evidence, the due process clause precluded the court or the prosecutor from dictating the jury's answer. In *United States v. Wilson*, 135 F.3d 291, 298-99 (4th Cir. 1998), the court reversed a conviction because the prosecutor argued that the defendant had committed a murder, a charge that the defense did not expect given the absence of evidence at trial and which it therefore did not have

the opportunity to rebut. In *Mak v. Blodgett*, 970 F.2d 614, 623-24 (9th Cir. 1992), the court applied the reasoning in *Skipper* to hold that the defendant had a right to rebut the prosecutor's argument portraying him as the ringleader in a murder even if it would not otherwise have been admissible as mitigating evidence.

These same due process principles also forbid prosecutorial arguments that misleadingly suggest – as the prosecutor did here – from the absence of evidence that the defense is made up. In *United States v. Udechukwu*, 11 F.3d 1101 (1st Cir. 1993), the First Circuit reversed a federal conviction because the prosecutor's closing argument cast doubt on the defendant's claim to have encountered a drug dealer who coerced her to serve as a mule, although the prosecution had obtained information corroborating what she had reported. "Whether the government's failure to disclose this credibility-strengthening information could be said to be reversible error, we need not decide. We have no doubt, however, that the prosecutor's persistent theme in closing argument suggesting the nonexistence of this information – and even the opposite of what the government knew – did fatally taint the trial." *Id.* at 1105. Similarly, here the prosecutor explicitly argued that Mr. Grant's claim of intentional production was made up and without factual support, despite knowledge that Mr. Grant had sought to prove that very fact with testimony that had been excluded on the prosecutor's objection. As in *Udechukwu*, facts outside the trial record (and therefore unknown to the jury) contradicted the prosecutor's argument. In *Davis v. Zant*, 36 F.3d 1538, 1549-50 & n.16 (11th Cir. 1994),

the Court ordered habeas relief because the prosecutor argued – as in this case – that the defense argument had been made up, exploiting the trial court's exclusion of evidence that would have shown the jury that this was untrue.

The Second Circuit's failure to mention the rebuttal argument in its terse summary order is a reason to grant, not to deny, review. Cf. *Smith v. United States*, 502 U.S. 1017, 1020 n.* (1991) (mem.) (Blackmun, O'Connor & Souter, JJ., dissenting) ("Nonpublication must not be a convenient means to prevent review."); *County of Los Angeles v. Kling*, 474 U.S. 936, 940 (1985) (Stevens, J., dissenting) (discussing unpublished and uncitable opinions as lacking "discipline and accountability"). Although that omission precludes us from arguing that the Second Circuit's treatment of the issue conflicts with that of other Circuits,[3] the summary order raises another concern warranting this Court's intervention: the issuance of decisions in substantial federal appeals unsupported by adequate explication of the law and the facts.

---

[3] Additional cases forbidding jury deception include: *United States v. Blueford*, 312 F.3d 962, 968 (9th Cir. 2002) (prosecutor argued an inference from taped telephone calls that was contrary to the actual records of the calls); *Brown v. Borg*, 951 F.2d 1011, 1015 (9th Cir. 1991) (prosecutor argued an inference of robbery because certain items were missing, although they were not); *United States v. Teffera*, 985 F.2d 1082, 1089 n.6 (D.C. Cir. 1993) (prosecutor's references to phantom evidence was an alternative ground for reversal).

This Court's ordinary standards for granting certiorari presume a robust and effective process of error correction in the courts of appeals. We mean no disrespect to the particular panel that decided this case in submitting that the Second Circuit's practice of deciding a very large percentage of appeals by summary orders that sometimes (as in this case) fail to grapple with the difficult issues merits this Court's attention. [4] This Court's review of unpublished decisions will deter carelessness and discourage the Circuit courts from disregarding or burying substantial issues in non-precedential rulings.

This is an appropriate case in which to exercise review of a summary decision by a court of appeals. The case was important to the public and the prosecution as well as to Mr. Grant. The government alleged billions of dollars in losses as a result of Bennett's scheme; the trial lasted more than three weeks; and Mr. Grant, who was a respected philanthropist and community leader with no prior criminal record, lost his liberty, perhaps for the remainder of his life. The summary order is

---

[4] According to the Second Circuit Handbook, the court disposes of 75% of appeals by summary order. Second Circuit Handbook, 17. The Administrative Office of the U.S. Courts reported that the Second Circuit decided 86.7% of cases terminated on the merits by unpublished decision for the year ending September 30, 2008. Judicial Business of the United States Courts 44 tbl. S-3 (2008), *available at* http://www.uscourts/.gov/judbus2008/contents.cfm. That is the fifth highest rate among the regional courts of appeals, behind the Fourth Circuit (92.3%); the Third (89.7%); the Eleventh (89.3%); and the Fifth Circuit (86.9%). *Id.* Calculating from the same table, 86.4% of the Second Circuit's case terminations were by summary orders similar to the one issued in Mr. Grant's case.

demonstrably wrong on several counts, revealing a lack of care that undermines confidence in the courts. For example, the order accepted the prosecution's argument on appeal that Mr. Grant was able to present his defense through "other evidence," ignoring the prosecution's position at trial that he had presented "no evidence" to support the inference of intentional and therefore innocent production of the notes. The summary order "disagree[d]" with the contention that the district court applied a different standard to defense evidence of innocent conduct than prosecution evidence of guilty conduct, though it is plain from the record that is what the district judge did.[5] The summary order also relied on the district

---

[5] In response to defense counsel's argument that evidence of consciousness of guilt is admitted even when there are alternative explanations for the conduct (3/18 Tr. 16), the district court ruled:

> Except that is not the law on consciousness of innocence, because the law on consciousness of innocence is different. On consciousness of innocence the law is that it really has to be the explanation that the jury would most likely latch on to.
>
> And as the Second Circuit said in the *Biaggi* case the jury is entitled to believe that most people would jump at a chance to obtain an assurance of immunity, It is the jump-at-a-chance option. The reason that the other consciousness of innocence type of defenses such as I turned down the plea agreement aren't considered admissible is because of the recognition of the multitude of explanations and that is just different from the law on what we might call consciousness of guilt. In other words, whether it is the destruction of the

court's exclusion of other evidence as mitigating harm; however that evidence was excluded for independent reasons.[6] The district court's ruling was

---

> document, whether it is the flight, whether it is the false name. There may be other explanations but the law has developed to permit that evidence to come in.

(Pet. App. 10a-11a). In finding the probative value of the evidence "very slight," the district court referred back to the earlier ruling: "this evidence doesn't fall within the case law admitting consciousness of innocence evidence. This is not so clear that we are into the jump-at-a-chance category and that is for a number of reasons. The first is something that we talked about earlier and that is that there are numerous alternative explanations of merit." (Pet. App. 15a-16a). The district court went on to canvas various alternative explanations. The assessment of limited probative value based on this legally erroneous analysis determined the outcome of the district court's Fed. R. Evid. 403 analysis. (Pet. App. 19a). Yet in *United States v. Biaggi*, 909 F.2d 662, 690-91 (2d Cir. 1990), the Second Circuit noted "[t]hat the jury might not draw the inference urged by the defendant does not strip the evidence of probative force." 990 F.2d at 691.

[6] On appeal, the prosecution pointed to two items: (1) property transfers after Bennett's arrest that it never offered in evidence; and (2) a letter from Mr. Grant's criminal lawyers after they had been told an indictment was expected belatedly asserting attorney client privilege in the notes on the basis of *United States v. Defonte*, 441 F.3d 92, 96 (2d Cir. 2006), a case holding that a document created for purposes of consulting with counsel is privileged. While the letter is inartfully worded, the prosecution has never disputed that it understood at the time that the letter was asserting an inadvertent privilege waiver, not inadvertent production of the notes. The district court properly excluded the letter as lacking probative value as to Mr. Grant's understanding of the notes; that ruling was not contingent on the exclusion of the Hannafan testimony.

not connected to or contingent upon the exclusion of the Hannafan testimony.[7]

The summary order's explication of the key Circuit precedent (*United States v. Biaggi*, 909 F.2d 662 (2d Cir. 1990)), is also deficient. It is simply not the case that there were no countervailing considerations against admitting the defense evidence in *Biaggi*. The prosecution argued and the court noted that the defendant had a good reason for refusing the prosecution's immunity deal that had nothing to do with immunity – fear of retaliation by those against whom the defendant would be required to testify in exchange for immunity.[8] The court also noted that there was a factual dispute that would have to be resolved about whether an immunity offer had actually been made.[9] Yet the Court in *Biaggi*

---

[7] The district court's suggestion that it would have allowed the admission of other evidence if the Hannafan testimony came in appears only in its post-judgment ruling denying Mr. Grant's motion for release pending appeal. *United States v. Grant*, 2008 WL 4579992, *7 (S.D.N.Y. Oct. 14, 2008). That ruling was not properly part of the appellate record and does not accurately characterize the district court's ruling during the trial.

[8] The *Biaggi* court explained: "[t]hough there may be reasons for rejecting the offer [of immunity] that are consistent with guilty knowledge, such as fear of reprisal from those who would be imculpated, a jury is entitled to believe that most people would jump at the chance to obtain an assurance of immunity from prosecution and to infer from rejection of the offer that the accused lacks knowledge of wrongdoing." 909 F.2d at 690.

[9] In *Biaggi*, the Second Circuit acknowledged the "latitude of a district judge in making Rule 403 determinations," but reversed notwithstanding the district court's concerns about "whether a hearing would be necessary to determine if an

nevertheless ruled that it was error to withhold evidence of the defendant's arguably innocent conduct from the jury, which should decide how to weigh it.

B. The Court should grant review of the second question presented because it is entangled with the first. Although it was error for the district court to have permitted the prosecutor's argument even if the decision to exclude the Hannafan testimony were correct, that argument also demonstrates precisely why the evidence was highly probative and vital to Mr. Grant's defense. The prosecutors could not explain why anyone would intentionally turn over to the SEC handwritten notes of a meeting with someone who had already been indicted for fraud if the notes actually showed guilty knowledge and participation in the fraud.[10] Other than the notes, there was no credible evidence of Mr. Grant's participation years after Bennett himself had thrown him out of management. Consequently, the question whether the notes were disclosed intentionally (as Mr. Grant sought to prove) or by accident (as the prosecutor argued) was the single most important question for the jury to decide.

In *Holmes v. South Carolina*, 547 U.S. 319 (2006), the Court rejected a special relevance rule disfavoring the defense on constitutional grounds. By

---

immunity offer had been made," 909 F.2d at 691, as that was in dispute.

[10] The prosecution did not dispute on appeal that Mr. Grant would have been entitled to demand act of production immunity, had he viewed the notes as incriminating.

the same token, there is no basis for adopting a different and more demanding standard for defense evidence of conduct manifesting innocence than prosecution evidence of conduct manifesting guilt. *See Biaggi*, 909 F.2d at 691 (quoting 2 Wigmore on Evidence § 293 at 232 (J. Chabourn rev. ed. 1979)) (urging that consciousness of innocence and consciousness of guilt evidence should be admitted liberally under the same standard); *United States v. Scheffer*, 523 U.S. 303, 331-32 & n. 19 (1998) (Stevens, J., dissenting) (quoting *Biaggi* with approval as to the importance of evidence of consciousness of innocence); *United States v. Maloof*, 205 F.3d 819, 825 (5th Cir. 2000 (defendant was permitted to testify concerning rejection of immunity following *Biaggi*); *United States v. Hamilton*, 579 F. Supp.2d 637 (D.N.J. 2008) (permitting defendant to prove uncounseled offer to take polygraph as showing consciousness of innocence).

CONCLUSION

The petition should be granted.

Respectfully submitted,

ROGER E. ZUCKERMAN*
AITAN D. GOELMAN
Zuckerman Spaeder LLP
1800 M Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 778-1800

**Counsel of Record*

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT http://www.ca2.uscourts.gov/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 1st day of July, two thousand and nine.

PRESENT: HON. BARRINGTON D. PARKER,
HON. RICHARD C. WESLEY,
Circuit Judges,
HON. MIRIAM GOLDMAN CEDARBAUM,
*District Judge.**

United States of America,

Appellee,

v.

SUMMARY ORDER
No. 08-4250(L), 08-4964-cr (CON)

Tone N. Grant,

Defendant-Appellant,

Phillip R. Bennett, Robert C. Trosten,

Defendants.

---

* The Honorable Miriam Goldman Cedarbaum of the United States District Court for the Southern District of New York, sitting by designation.

For the Appellee: Christopher L. Garcia, Jonathan S. Kolodner, Assistant United States Attorneys, *for* Lev L. Dassin, Acting United States Attorney for the Southern District of New York, New York, New York.

For Defendant-Appellant: Aitan D. Goelman, Roger E. Zuckerman, David A. Reiser, Benjamin M. Block, Zuckerman Spaeder, LLP, Washington D.C.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court is **AFFIRMED.**

Defendant Tone N. Grant appeals from a judgment of conviction of the United States District Court for the Southern District of New York (Buchwald, *J.*) on various charges in connection with the collapse of Refco, Inc., the financial services firm. We assume the parties' familiarity with the factual and procedural history of this case, as well as the issues on appeal.

Grant's arguments largely concern notes he took at a meeting with Phillip Bennett, his alleged co-conspirator. At trial, Grant sought to admit the testimony of his former lawyers to explain the circumstances under which Grant produced the notes in response to a subpoena from the Securities and Exchange Commission. The production of these documents at a time when he had a right to refuse under the Fifth Amendment, Grant argues, "was probative of innocence because it showed that he did not see anything incriminating in the notes."

We review evidentiary rulings for abuse of discretion. *See United States v. Dhinsa*, 243 F.3d 635, 649 (2d Cir. 2001). A court abuses its discretion when its decision "cannot be located within the range of permissible decisions or is based on a clearly erroneous factual finding or an error of law." *United*

States v. Rigas, 490 F.3d 208, 238 (2d Cir. 2007) (internal quotation marks omitted).

The district court did not abuse its discretion. Although the defense argues that the district court erroneously applied "a special standard for the admissibility of 'consciousness of innocence'

[2]

evidence unsupported in this Court's decisions," namely, *United States v. Biaggi*, 909 F.2d 662, 690-91 (2d Cir. 1990), we disagree. Rather, after finding the evidence relevant under Fed. R. Evid. 401, the district court properly weighed the probative value of the evidence against other countervailing considerations, such as the potential for confusion of the issues, as required by Fed. R. Evid. 403. The district court reasoned that given the numerous alternative explanations for the production of evidence, the probative value of the testimony was slight,

particularly when balanced against the host of potentially confusing issues the testimony would introduce, such as ethical and legal obligations to produce documents, the Fifth Amendment, and attorney-client waiver issues. We also note here that the defendant was able to offer this evidence through other means at trial and that the district court declined to admit government evidence that would have severely damaged this defense.

Further, *Biaggi*, on which the defendant places great reliance, is distinguishable. The defendant in *Biaggi* sought to introduce evidence that he had rejected the government's immunity offer; in contrast, the defense's proffered testimony regarding the notes lacks the obvious force that made the evidence in *Biaggi* both highly relevant and highly probative under Fed. R. Evid. 401 and 403. *Id.* at 690. Moreover, there

were no similar countervailing considerations at issue in *Biaggi*.

Grant also argues that the district court improperly excluded evidence that prominent law and accounting firms reviewed Refco's statements, evidence which, Grant argues, "made it seem that the company's operations were above-board, as circumstantial evidence negating knowledge." Again, we see no abuse of discretion. First, Grant was able to admit much of the evidence that the defendant now argues was precluded with respect to Mayer Brown and Refco's audit accountants. Second, although the district court did exclude evidence concerning Ernst & Young, it was for the

[3]

acceptable reason that the defense had not sufficiently demonstrated the connection between this evidence and the defendant's state of mind. Further, the district

court found the probative value of the evidence to have been substantially outweighed by the potential for confusing the jury.

We have considered the defendant's remaining contentions and find them without merit. For the foregoing reasons, we AFFIRM the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk of Court

By:_____

[4]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

v. 05 CR 1192 (NRB)

TONE GRANT,

Defendant.

----------x

New York, N.Y.
March 18, 2008
11:00 a.m.

Before:

HON. NAOMI REICE BUCHWALD,

District Judge

APPEARANCES

MICHAEL J. GARCIA
United States Attorney for the
Southern District of New York
NEIL M. BAROFSKY
CHRISTOPHER L. GARCIA
Assistant United States Attorney

ZUCKERMAN SPAEDER, LLP
Attorneys for Defendant
ROGER ZUCKERMAN
AITAN D. GOELMAN

Also present: Robert Manchak, investigator.

[1]

* * *

THE COURT: Except that is not the law on consciousness of innocence, because the law on consciousness of innocence is different. On consciousness of innocence the law is that it really has to be the explanation that the jury would most likely latch on to.

And as the Second Circuit said in the *Biaggi* case the jury is entitled to believe that most people would jump at a chance to obtain an assurance of immunity. It is the jump-at-a-chance option. The reason that the other consciousness of innocence type of defenses such as I turned down the plea agreement aren't considered admissible is because of the recognition of the multitude of explanations and that is

[16]

just different from the law on what we might call consciousness of guilt. In other words, whether it is the destruction of the document, whether it is the flight, whether it is the false name. There may be other explanations but the law has developed to permit that evidence to come in.

* * *

[17]

* * *

MR. ZUCKERMAN: We did not intend to ask any of that of the Hannafans. We intend to ask the Hannafans the following, if you will permit me to lead as I might:

Were you engaged in or about the middle of October?

THE COURT: By the way when were they engaged?

MR. ZUCKERMAN: Middle of October 2005.

Were you engaged?

Following your engagement, did there come a time when you provided a copy of the Bennett indictment to Mr. Grant?

Yes.

Following your engagement did there come – about when, I think it is October 18th or thereabouts.

Did there come a time following your engagement when you discussed with Mr. Grant the article appearing in the press regarding Maggio's cooperation?

Yes.

About when?

Did there come a time after your engagement when you

discussed with Mr. Grant the possibility that documents would be subpoenaed by a verity of sources including the Department of Justice?

Yes.

Did there come a time after these conversations when Mr. Grant provided you a group of documents?

Yes.

About when?

November 2020 to November 29th.

Within the group of documents he provided, did there come a time when you discussed a particular set of notes?

Yes.

Show you the exhibit. Did you discuss these notes with him?

Yes.

That is it. That is it.

THE COURT: I know you would like it to be it.

MR. ZUCKERMAN: And the same examination in brevity and narrowness as regards the subpoena from the SEC, the documents that go to the SEC, and their considered nature. And then really Mr. Barofsky and Mr. Garcia can ask anything they want within the limits that deal with the production of the notes by Mr. Grant. They have a full right of confrontation there.

* * *

[23]

* * *

We have talked for a long time and let me give you a ruling on the motion and let us start with where we were earlier, which is the sequence of events will essentially come out during the trial and certainly I cannot say that every

aspect of the sequence will, but I think in large part the sequence of events will come out. So the issue really is how much flesh is to be added to so the bones of the sequence of events.

I think that the proffered evidence to the extent that it doesn't simply include inadmissible hearsay has limited probative value within the meaning of 401, which is relevant evidence, evidence having any tendency to make the existence of a fact more probable than not.

However, I would find the probative value to be very slight, and that is for a number of reasons. First as we talked about earlier this evidence doesn't fall within the case law admitting consciousness of innocence evidence. This is not so clear that we are into the jump-at-a-chance category and that is for number of reasons. The

first is something that we talked about earlier and that is that there are numerous alternative explanations of merit.

First is simply that there was no choice, that there is a duty to retain documents once you've been sued and Mr. Grant had been sued. There is also the issue that the lawyers had no ethical choice. There is also the possibility that the documents were turned over because their significance was not appreciated and the consequences of the production may not be appreciated in that context of possibility that the government had focused on Mr. Bennett and was not interested in

[15]

Mr. Grant. There is a variation on that theme.

There is the alternative explanation that the production is absolutely deliberate and was to

demonstrate to the SEC that Mr. Grant would be a fine witness against Mr. Bennett. And the other alternative explanation is that there were other reasons to preserve the notes, positive reasons, that as noted earlier they provided a basis for Mr. Grant to testify against Mr. Bennett.

They are protection for Mr. Grant in a business sense. They are protection for Mr. Grant if it turns out that Mr. Bennett decides to cooperate. And one also shouldn't forget that Mr. Bennett knew that he took the notes. So again if Mr. Bennett was cooperating, he would be in a position to say that Mr. Grant had destroyed the notes as they weren't produced.

There are other reasons that this evidence has limited probative value. First of all, the theory offered by the defendant is inconsistent with the property transfers that were done at approximately

the same time. There is the fact that there was a request to return them.

The sort of consciousness of innocence defense is really contradicted by two other arguments that the defendants have made. One is that the notes are not really helpful on the issue that the trial involves, simply what did Lee, Thomas H. Lee know or not know. Secondly, the argument that was made

[46]

this morning that they are inherently ambiguous. If they are inherently ambiguous, turning them over is in a sense no big deal.

Given my view that they are such limited probative value, we then turn to the 403 analysis and here my concern is that raising these – having the Hannafans testify as to material offered in the proffer raises a host of other issues such as did his

lawyers have an ethical obligation to produce the documents, what were his conversations with the lawyers, did they discuss the Fifth Amendment, did they discuss ethical issues, and did they discuss the meaning of the notes.

We get into the other litigations that Mr. Grant was named in, his obligations to retain documents, and his failure to a produce these notes in other civil litigations. We get into all the relevant considerations that we've talked about somewhat of destroying them versus producing them. Finally, we get into the privilege issue of inadvertent waiver, issues perhaps relating to his representation.

Doing that 403 balance analysis this would truly be a trial within a trial and given the very limited probative value, I am not going to permit the testimony that has been proffered by that

defense in the proffer that was served on March 14th.

* * *

[47]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, New York, N.Y.

v. S4 05 Cr. 1192 (NRB)

TONE GRANT,

Defendant.

----------x

April 15, 2008
9:00 a.m.

Before:

HON. NAOMI REICE BUCHWALD,
District Judge

APPEARANCES

MICHAEL J. GARCIA
United States Attorney for the
Southern District of New York
BY: NEIL BAROFSKY
CHRISTOPHER GARCIA
Assistant United States Attorneys

ZUCKERMAN SPAEDER, LLP
Attorneys for Defendant
BY: ROGER ZUCKERMAN
AITAN GOELMAN
NORMAN EISEN

* * *

THE COURT: All right. Let me just before me bring the jury in put on the record certain rulings that I made in our telephone conference about 5:30 last evening.

* * *

There was also a letter concerning whether the

[2720]

government would be permitted to argue today that the submission of the notes of Mr. Grant was accidental. The ruling was that the government could argue that. I just want to note that the defendant's argument assumes what Mr. Hannafan's testimony would have been and assumes no effective cross and doesn't deal really with the complexity of the ruling on the

consciousness of innocence events or issues related to waiver of attorney-client privilege.

Unless there is something else?

MR. GOELMAN: May I just put something on the record with regard to the ruling on the government's argument?

The defendant's position was that because Mr. Hannafan's testimony was successfully precluded by the government, they should not be able to argue potential explanations that would have been disproved by his testimony. The Court is right that the government would be able to cross-examine Mr. Hannafan and they would have been able to subject his testimony to those rigors. They chose not to. They chose instead to keep him off the stand, and we don't believe that there is any question that Mr. Hannafan's testimony is set forth in the proffer submitted to this Court

pretrial.

I would also just like to put on the record that I don't think we renewed our Rule 29 motion after we rested yesterday, and we do so now.

[2721]

THE COURT: The Rule 29 motion either way is denied.

Again, the whole point is that argument really doesn't deal with the complexity of the rulings. It doesn't remotely deal with facing up to the question of waiver of attorney-client privilege if he had gotten on the stand.

* * *

[2722]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, New York, N.Y.

v. S4 05 Cr. 1192 (NRB)

TONE GRANT,

Defendant.

----------x

April 16, 2008
9:00 a.m.

Before:

HON. NAOMI REICE BUCHWALD
District Judge

APPEARANCES

MICHAEL J. GARCIA
United States Attorney for the
Southern District of New York
BY: NEIL BAROFSKY
CHRISTOPHER GARCIA
Assistant United States Attorneys

ZUCKERMAN SPAEDER, LLP
Attorneys for Defendant
By:` ROGER ZUCKERMAN
AITAN GOELMAN
NORMAN EISEN

* * *

When he said to Maggio and Trosten: I'm going to meet with Grant and tell him about the $1.1 billion debt and that there's going to be hundreds of millions of dollars leftover, Phillip Bennett was telling them the truth. That's what these notes show.

And they also show that Phillip Bennett told Tone Grant, the unvarnished truth, that that there was $1.1 billion in real, his words that he wrote down, real debt; and 264 million of it was going to be leftover. That's corroboration.

Now, they have to deal with this, right. I mean they have to. So what do they do? Well, they go back to the old standby, speculation and guesswork.

These documents were produced by Tone Grant's lawyers to the Securities and Exchange

Commission. They weren't produced by Tone Grant to us, as Mr. Goelman suggested. No,

[2974]

not at all. The Securities and Exchange Commission. They are down in Washington, D.C. if you want to look at the document. They enforce civil securities law. Not our office. Not the government that's prosecuting him, us. No.

And they weren't produced directly by Tone Grant. They were proceeded by his lawyers, the Hannafans. You can see the documents in the stip.

Now, they want you to infer from this fact a whole bunch of things, but there is no evidence to support these inferences.

Now I'm going to once again step into their world and do some guesswork with you, and show you that when you enter this game of guessing, you can come up with all sorts of good guesses.

How about this one? Tone Grant had absolutely no idea that his lawyers were going to be producing these handwritten notes when they produced those giant stack of documents.

MR. GOELMAN: Objection.

MR. BAROFSKY: Giant stack of documents that you can look at in that jury room if you want. They are all the exhibits that are in that stipulation. They are numbered in the eight thousand series. You look at that giant stack of documents. And you can speculate and guess that Tone Grant may have had no idea that those notes were mixed in with them. We don't even know when those documents got to his lawyers.

[2975]

We're going to speculate. We know a lot was happening in October of 2005, well before the SEC subpoena in '06. We know there was a bankruptcy

proceeding. We know that Phil Bennett got arrested. We know that lawsuits are flying around involving Lee and the defendant. There's all sorts of reasons why people would bring documents to their lawyers.

There's all sorts of reasons why Phillip – why Tone Grant would have kept those notes in the first place. Remember who he's dealing with here. Remember who he's got a deal for $275 million with. Phil Bennett.

He knows who Phil Bennett is. And there's nothing wrong with having some notes to hold over Phil Bennett's head if he doesn't come through with that money later on. All sorts of reasons.

Now, Mr. Goelman – get 42 up. Thank you, Mr. Smith.

Mr. Goelman tells you, well, there is a subpoena and buried in the subpoena on page whatever of the rider there's a small line that says

that: Oh, these documents may one day be produced to the U.S. Attorney's Office.

First of all, not a shred of evidence that Tone Grant himself ever saw this subpoena. But if he did, maybe he also looked at page 1: "You must comply with the subpoena. You may be subject to a fine and/or imprisonment if you do not."

That's what Tone Grant's lawyers received before they produced the documents. It's guesswork. It's speculation.

[2976]

It's guesswork and it's speculation and it doesn't change the facts. Whatever the reasons were, why in 2006 Tone Grant's lawyers produced those notes, it doesn't change the fact that it shows that he knew there was $1.1 billion in real -- real, his word, real debt, as opposed to the fake lies contained in

these documents, the lies that netted him $16 million in cash.

* * *

[2977]